



ARKANSAS JUDICIARY

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Rule 41. Dismissal Of Actions.

(a) Voluntary Dismissal; Effect Thereof.

(1) Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

(2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

(3) In any case where a set-off or counterclaim has been previously presented, the defendant shall have the right of proceeding on his claim although the plaintiff may have dismissed his action.

(b) Involuntary Dismissal. In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

(c) Dismissal of Counterclaim, Cross-Claim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim or third-party claim.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action, or who has suffered an involuntary dismissal in any court, commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. For purposes of this rule, the term "costs" means those items taxable as costs under Rule 54(d)(2).

Reporter's Notes to Rule 41: - 1. Rule 41 differs significantly from FRCP 41 and basically follows prior Arkansas law. Under the Federal Rule, a plaintiff has the unqualified right to dismiss his claim without prejudice only until the defendant has filed his answer. Thereafter, court approval is required in order to dismiss without prejudice and the court has discretion to deny such a motion. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752 (1947). Indeed, FRCP 41 was purposely adopted to prevent a plaintiff from taking a voluntary non-suit at any stage of the proceedings and to put the control in the hands of the trial judge. *Ockert v. Union Barge Line Corp.*, 190 F. 2d 303 (C.C.A. 3rd, 1951).

2. Section (a) rejects the limitations contained in FRCP 41 and instead follows prior Arkansas law as set forth in superseded Ark. Stat. Ann. 27-1405 (Repl. 1962), by permitting one voluntary non-suit at any stage of the case prior to its submission to the jury or the court sitting as the fact finder. This Section does recognize, however, that court approval must be obtained in order to dismiss a claim under Rule 23 (d) and Rule 66.

3. Section (a) retains the provisions of superseded Ark. Stat. Ann. 27-1407 (Repl. 1962), which permitted a defendant to proceed on his set-off or counterclaim even though the plaintiff's claim has been dismissed.

4. Section (b) also marks a significant variation from FRCP 41(b). Under this rule, the trial court has the right to dismiss on its own motion a claim for failure to prosecute the action or failure to comply with these rules or any order of the court. Under the Federal Rule, such dismissal must be on motion of the defendant or other party affected. Also, under FRCP 41, a dismissal by the court under Section (b) is generally with prejudice, whereas under this rule, such a dismissal is without prejudice provided the case has not been previously dismissed in which event the second dismissal is with prejudice. The Federal Rule was rejected for the reason that while it states that an involuntary dismissal is with prejudice, the appellate courts have been quick to find an abuse of discretion on the part of the trial court in dismissing a claim. *Pond v. Braniff Airways, Inc.*, 453 F. 2d 347 (C.C.A. 5th, 1972); *Dyotherm Corp. v. Turbo Machine Co.*, 392 F. 2d 146 (C.C.A. 3rd, 1968). The Committee believed that the better practice is to make an involuntary non-suit without prejudice, but limit the number of times a case can be dismissed, whether voluntarily or involuntarily.

5. Omitted from Rule 41 is the provision found in FRCP 41(b) relative to dismissals after the completion of plaintiff's case when it is tried without a jury. Rule 50(a) accomplishes the same purpose whether the case is tried with or without a jury. This is the procedure previously followed in Arkansas and it has seemingly worked well.

6. Section (d) goes beyond the language of FRCP 41(d) by expressly permitting the trial court to impose costs or sanctions against a party who has previously had his claim dismissed, whether voluntarily or involuntarily. While the Federal Rule does not expressly confer such power upon the trial court, it has been held that the court does possess such power. *Gainey v. Brotherhood R. & S. S. Clerks*, 34 F.R.D. 8 (D.C. Pa., 1963). This rule is designed to clear any misunderstanding or confusion on this point.

Additions to Reporter's Notes, 1984 Amendments: - Rule 41(b) is amended to make specific the time period after which the court must order cause to be shown why the case should not be dismissed for want of prosecution. While Rule 10 of the Uniform Rules for Circuit and Chancery Courts provided such a dismissal was without prejudice, this rule provides it is with prejudice if it is the second dismissal, whether the previous dismissal was voluntary or involuntary.

Addition to Reporter's Notes, 1999 Amendment: - Subdivision (a) has been divided into three numbered paragraphs and revised to reflect case law. In *Blaylock v. Shearson Lehman Brothers, Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997), the Supreme Court noted that it had "long interpreted [Rule 41(a)] as creating an absolute right to a nonsuit prior to submission of the case to the jury or to the court." In the same case, the Court held that "a court order is necessary to grant a nonsuit and the judgment or decree must be entered to be effective."

A new sentence has been added to subdivision (d) defining "costs" as those recoverable under Rule 54(d)(2), a new provision. A definition was deemed advisable in light of continuing confusion as to expenses that can be taxed as costs. See, e.g., *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994); *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

Addition to Reporter's Notes, 2003 Amendment: - The reference to "Rule 23(d)" in subdivision (a)(1) has been corrected to read "Rule 23(e)."

History Text:

History. Amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992; amended January 28, 1999; amended March 13, 2003

Associated Court Rules:

Rules of Civil Procedure

Group Title:

VI. Trials

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